***United States Court of Appeals***

***for the Second Circuit***


# APPELLEE'S BRIEF

75-1054

75-1054

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P/S

IN THE

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

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UNITED STATES OF AMERICA,

Appellee,

v.

JACKIE L. HARRIS,

Appellant.

---

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE

WESTERN DISTRICT OF NEW YORK.

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# BRIEF FOR APPELLEE

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## ISSUES PRESENTED*

In the opinion of the Appellee, the following issues are presented:

I. Whether a Travellers Express Company money order is a "security" within the meaning of Title 18 U.S.C. §2314.

II. Whether there was sufficient evidence of the elements required to prove a violation of Title 18 U.S.C. §2314 to submit the case to the jury.

III. Whether the District Court erred in allowing into evidence proof of other crimes.

IV. Whether the testimony of the government witness Jacqueline K. Smith was so incredible as a matter of law that it ought to have been stricken.

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*This case has not previously been before this Court .

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Assistant United States Attorney
of Counsel.

## COUNTERSTATEMENT OF THE CASE

The indictment in this case was filed on May 4, 1973 and charged the defendant Jackie Harris with five counts of violating Title 18 U.S.C. §2314 for transporting and causing to be transported in interstate commerce falsely made and forged Travellers Express Company money orders. A codefendant, Samuel L. Harris, a brother of the appellant, was charged in the same indictment with one count of violating Title 18 U.S.C. §2314 involving the same money orders. Samuel L. Harris entered a plea of guilty to a superseding information on December 23, 1974 charging a misdemeanor violation of Title 18 U.S.C. §2113(b) and was sentenced to a jail term of six months on January 13, 1975.

The trial of the defendant Jackie L. Harris was held before the Honorable Harold P. Burke at the U.S. District Court at Rochester, New York on January 20-22. On January 22, 1975 the jury returned a verdict of guilty on Count I of the indictment and were unable to reach a unanimous verdict with regard to the remaining counts. The defendant was sentenced on February 10, 1975 to eighteen months imprisonment on his conviction of Count I of the indictment. The remaining counts of the indictment are still pending in the U.S. District Court in Rochester.

## COUNTERSTATEMENT OF FACTS

In February, 1971 seventy-eight Travellers Express Company money orders were stolen from Joe's Grocery Store, 791 Plymouth Avenue, Rochester, New York (Tr. 4). These money orders were reported stolen to the Travellers Express Company on February 11, 1971 (Tr. 8, 90). The date of the theft was reported as February 2, 1971 (Tr. 94).

A government witness, Jacqueline Smith, testified that in February, 1971 she had a conversation with the defendant Jackie L. Harris wherein the defendant told her that he had stolen the money orders from Joe's Grocery Store (Tr. 42, 43), asked to purchase a typewriter from her (Tr. 41, 42), and asked if she wanted to make some money by cashing the money orders (Tr. 42) and splitting the cash with the defendant (Tr. 43, 44). Jacqueline Smith further testified that she did cash a money order for the defendant on February 10, 1971 at Sears, Roebuck, Rochester, New York and split the cash with Jackie L. Harris (Tr. 42, 43, 44). The money order cashed by Jacqueline Smith was within the group reported stolen from Joe's Grocery Store (Tr. 90).

On February 12, 1971, Exhibit G-1, a money order was negotiated at the Sears, Roebuck Company, Rochester, New York together with a Sears payment bill from the account of Laverne Gray. The money order was in the amount of $150 and $101.72 was applied to the account of Laverne Gray and the balance paid

in cash (Tr. 15, 16, 17). The description of the person cashing the money order and paying the bill fit the physical appearance of the defendant Jackie Harris (Tr. 17), although the witness could not make a positive in court identification (Tr. 17, 18). Laverne Gray testified that he did not pay his bill with that money order (Tr. 68, 69), and, further, that he did not pay that bill at all (Tr. 68, 69). Mr. Gray further testified that he used to receive his Sears, Roebuck bill by mail (Tr. 68). Jacqueline Smith testified that she was with Jackie L. Harris when he would take mail from mailboxes (Tr. 44, 45, 46).

A Special Agent from the F.B.I. Laboratory in Washington, D.C. testified that latent fingerprints found on each of the money orders which were the subject of the indictment were those of the defendant Jackie Harris (Tr. 136-155). This agent further testified that a latent fingerprint found on Exhibit 26, the Sears, Roebuck bill of Laverne Gray, was that of the defendant Jackie L. Harris (Tr. 149). The Sears bill had the left thumb impression of Jackie Harris (Tr. 149). The fingerprints of Jackie Harris also appeared on the bottom of Exhibit G-1, the money order negotiated along with the Sear's bill (Tr. 146).

## ARGUMENT

### POINT I

### A TRAVELLERS EXPRESS COMPANY MONEY ORDER IS A SECURITY WITHIN THE MEANING OF TITLE 18 U.S.C. §2314

The word "securities" as used in Title 18 U.S.C. §2314 is defined in §2311 of that Title. The very nature of this definition establishes that Congress intended to include every common type of negotiable commercial paper. Furthermore, if Congress had intended to exclude "money order" from this definition it could have and would have excepted it from coverage specifically. This is especially true in view of the fact that Congress did specifically exclude from the applicability of §2314 certain items in the last paragraph of that statute:

> This section shall not apply to any falsely made, forged, altered, counterfeited or spurious representations of an obligation or other security of the United States, or of an obligation, bond, certificate, security, treasury note, bill, promise to pay or bank note issued by any foreign government or by a bank or corporation of any foreign country.

Nowhere does Congress exclude "money order" from the definition of "securities" or from the applicability of the statute, despite obvious opportunities to do so. It would seem, then, that Congress probably intended to include "money orders" within this

statute.

The only court to actually consider the issue raised by this appellant was the 10th Circuit in Nelson v. United States, 406 F.2d 1136 (10th Cir. 1969). In that case the Court said:

> [It] is necessary to comment briefly upon the assertion by the appellant that the indictment was also faulty because it was based upon the passing of American Express Money Orders which are not "securities" within the meaning of 18 U.S.C. §§2311 and 2314. This contention is grounded upon the fact that although the definition of a "security" is somewhat broad, there is no specific reference to money orders. Nevertheless, it is clear that a money order is an "evidence of indebtedness" and therefore included within the statutory definition. Cf., Castle v. United States, 287 F.2d 657 (5th Cir. 1961); McGee v. United States, 402 F.2d 434 (10th Cir. 1968); Kreuter v. United States, 376 F.2d 654 (10th Cir. 1967); United States v. Braverman, 376 F.2d 249 (2d Cir. 1967) cert. denied 389 U.S. 885, 88 S.Ct. 155, 19 L.Ed.2d 182; United States v. Smith, 310 F.2d 121 (4th Cir. 1962); United States v. Nelson, 273 F.2d 459 (7th Cir. 1960).

While this court did not provide a detailed discussion of this issue, its conclusion that a "money order is an 'evidence of indebtedness' and therefore included within the statutory definition" is well-founded. A money order is clearly "evidence of indebtedness" when you consider the relationship between Travellers Express Company and the purchaser of an authorized money order. Specifically, prior to the actual purchase of the money order, there is no relationship between Travellers and that purchaser. The relationship arises only because the purchaser gives money to Travellers in return for that company's

promise to pay the money to the person designated by the purchaser. The evidence of this indebtedness by the company is the actual money order itself.

There appears to be no definitive decision in this Circuit. However, the courts who have considered indictments charging violations of Title 18 U.S.C. §2314, based upon the interstate transportation of forged and altered money orders have consistently found no problem with the fact that money orders were the subject of the indictments. United States v. Adams, 454 F.2d 1357 (7th Cir. 1972) cert. denied 405 U.S. 1072; United States v. Smith, 426 F.2d 275 (6th Cir. 1970) cert. denied 400 U.S. 868; United States v. Bedgood, 453 F.2d 988 (5th Cir. 1972); United States v. Smith, 452 F.2d 638 (4th Cir. 1971); United States v. Davis, 434 F.2d 1108 (8th Cir. 1970); United States v. Blair, 456 F.2d 514 (3rd Cir. 1972); United States v. Rogers, 475 F.2d 821 (7th Cir. 1973).

## POINT II

## THE DISTRICT COURT PROPERLY DENIED THE DEFENDANT'S MOTION FOR JUDGMENT OF ACQUITTAL AT THE CLOSE OF PROOF AND PROPERLY SUBMITTED THE CASE TO THE JURY

Appellant contends that as a matter of law the court should have granted his motion for judgment of acquittal on the

ground that the government failed to establish a prima facie case for a violation of Title 18 U.S.C. §2314. Such a contention betrays a misunderstanding of both the evidence in this case and the function of court and jury in a criminal trial.

It is settled, of course, that this Court, in reviewing the denial of a motion for judgment of acquittal, must examine the evidence in the light most favorable to the Government and must determine whether a reasonable mind might fairly conclude guilt beyond a reasonable doubt, making full allowance for the jury to assess the credibility of the witnesses, weigh the evidence and draw justifiable influences from it. United States v. Barash, 412 F.2d 26 (2d Cir. 1969); United States v. Aiken, 373 F.2d 294 (2d Cir. 1967); Crawford v. United States, 375 F.2d 332 (D.C. Cir. 1967); United States v. Wilson, 342 F.2d 43 (2d Cir. 1965); United States v. De Sisto, 329 F.2d 929 (2d Cir. 1964) cert. denied 377 U.S. 979 (1964).

In this case, the evidence, particularly when viewed in the light most favorable to the government, presents an overwhelming case that the appellant is guilty beyond a reasonable doubt. This evidence is as follows:

1. The 78 blank money orders were stolen from Joe's Grocery Store (Tr. 4) and were reported as stolen to the Travellers Express Company (Tr. 8, 90, 94).
2. Jacqueline Smith testified that Jackie Harris told her that he had taken the money orders and intended to make some money by cashing them (Tr. 41-44).

The scheme was established.

3. Jacqueline Smith sold Jackie Harris a typewriter that had a red and black ribbon (Tr. 42) and the money orders in evidence were completed with a typewriter with a red ribbon (See, Exhibits G-1 through G-24).

4. Jackie Harris participated in the actual cashing of Exhibit G-23 by aiding and abetting Jacqueline Smith and receiving half of the proceeds (Tr. 43, 44).

5. Jackie Harris did go with Jacqueline Smith to steal mail (Tr. 44); the bill of Laverne Gray was usually received in the mail by him (Tr. 68); and Laverne Gray did not pay the bill in question (Tr. 68, 69).

6. The description of the person cashing the money order Exhibit G-1 and paying the Laverne Gray bill at Sears, Roebuck fit the general description of the defendant Jackie Harris (Tr. 17).

7. The fingerprints found on Exhibit G-1 and the thumb print found on the Laverne Gray Sears, Roebuck bill, Exhibit G-26, were those of the defendant Jackie Harris (Tr. 136-155).

8. The fingerprints found on Exhibits G-2, G-3, G-4 and G-5 were those of the defendant Jackie Harris (Tr. 136-155).

9. The explanation by Jackie Harris of how his fingerprints happened to appear on so many exhibits is patently unbelievable (Tr. 181, 182).

While there is certainly other evidence upon which the jury could base its findings, these items alone appear to irresistably lead to the conclusion that the defendant could reasonably be found guilty beyond a reasonable doubt by the jury.

Furthermore, in view of the court's charge of aiding and abetting, there can be no claim that there was insufficiency of evidence regarding the defendant's participation in the crime. Of course, it is fundamental that the government need not prove that the defendant himself personally performed each element of the crime. Nye & Nissen v. United States, 336 U.S. 613 (1949).

The fact that the government's case rested, in part, on circumstantial evidence is of significant import. United States v. Harris, 435 F.2d 74 (1970). It is well-recognized, of course, that circumstantial evidence is not an inferior type of evidence and is no different from direct testimonial evidence. Holland v. United States, 348 U.S. 121 (1954); United States v. Brown, 236 F.2d 403 (2d Cir. 1956). As the Supreme Court has remarked, "[D]irect evidence of a fact is not required. Circumstantial evidence is not only sufficient, but may also be more certain, satisfying and persuasive than direct evidence." Micholic v. Cleveland Tanker, Inc., 364 U.S. 325 (1960).

## POINT III

## THE DISTRICT COURT PROPERLY ADMITTED EVIDENCE OF THE THEFT AND NEGOTIATION OF ALL MONEY ORDERS AND TESTIMONY REGARDING MAIL THEFT BY THE DEFENDANT JACKIE HARRIS.

The evidence in this case established that Jackie Harris stole 78 Travellers Express Company money orders and developed a scheme whereby he and others would cash the money orders at Rochester stores and divide the proceeds. It was part of that scheme that stolen mail would be used as a pretext for cashing the money orders; namely, the Sears, Roebuck Company bill on the account of Leverne Gray. Although the indictment did not specifically charge the defendant with violations relative to each money order stolen and cashed, it is clear that this evdience was relevant and material to the government's proof. The fact of Mr. Harris engaging in theft of mail is relevant and material to the explanation of how he obtained possession of the Sear's bill which was so artfully used in the negotiation of the money order charged in Count I of the indictment.

Appellant's statement that there was no probative evidence linking him to the transaction at Sears, Roebuck and Company is ludicrous. Surely the jury could not be expected to ignore the fact that the witnesses description of the person

who cashed the money order is identical to that of the defendant Jackie Harris (Tr. 16, 17); the Sear's bill of Leverne Gray was always received by him through the mail and he did not receive Exhibit G-26 in his mail and did not pay the bill (Tr. 68, 69); and the defendants thumbprint was identified on this very same Sear's bill (Tr. 149). identified as Exhibit G-26.

While some courts express their "other crimes" rule in an "exclusionary" form, the Second Circuit has adopted the "inclusionary" form of the rule. Specifically, this Circuit recognizes the general admissibility of evidence of other crimes, except if offered solely to prove criminal character of the defendant. U.S. v. Denton, 381 F.2d 114 (2d Cir. 1967); U.S. v. Crisona, 416 F. 2d 107 (2d Cir. 1969); Michelson v. U.S., 335 U.S. 409 (1948); Spencer v. Texas, 385 U.S. 554, 561 N.7 (1967).

It is well established that proof of "other crimes" is permissible in the following circumstances:

Where the proof of another crime aids in or is a necessary aspect of establishing the crime in question, it is admissible. U.S. v. Marquez, 332 F.2d 162 (2d Cir.) cert. denied 379 U.S. 890 (1964); U.S. v. Davis, 151 F.2d 140 (2d Cir. 1945) aff'd. 328 U.S. 582 (1946); U.S. v. Bozza, 365 F. 2d 206 (2d Cir. 1966); Hanks v. U.S., 388 F.2d 171 (10th Cir.) cert. denied, 393 U.S. 863 (1968).

Proof of other crimes is admissible as necessary parts of the proof of an entire deed or as closely connected with the time, scene, or circumstances of the crime charged, i.e., a part of the "res geste". I Wigmore, Evidence, §218; Armstrong v. U.S., 327 F.2d 189 (9th Cir. 1964); Shokley v. U.S., 166 F.2d 704 (9th Cir.) cert. denied, 334 U.S. 850 (1948).

Prior and subsequent similar crimes may be admissible to prove intent of the defendant to commit the crime charges. U.S. v. Johnson, 382 F.2d 280 (2d Cir. 1967); U.S. v. Braverman, 376 F.2d 249 (2d Cir.) cert. denied, 389 U.S. 885 (1967) (proof of cashing 33 additional money orders); U.S. v. Byrd, 352 F.2d 570 (2d Cir. 1965).

Proof of prior crimes are admissible to show a continuing plan, system, or design by the defendant where the acts are logically connected with those charged or the acts are so closely and inextricably mixed up with the history of the guilty act itself as to form part of the plan or system of criminal action. U.S. v. Crowe, 188 F.2d 209 (7th Cir. 1951); U.S. v. Light, 394 F.2d 908 (2d Cir. 1968).

Proof of other crimes admissible to show absence of mistake or accident. U.S. v. Jordan, 399 F.2d 610 (2d Cir.) cert. denied, 393 U.S. 1005 (1968). This is especially true in view of the defendant's explanation for the presence of his fingerprints on the Exhibits in evidence (Tr. 181).

Furthermore, the court instructed the jury regarding the use by it of proof of other crimes (Tr. 225). Since the evidence of other crimes was admissible as a proper exercise of discretion by the trial judge, as argued above, there was no need for this charge. The fact that this cautionary instruction was given to the jury should remove all doubt that the jury was not prejudiced by the evidence in question.

## POINT IV

## IN NO SENSE CAN IT BE SAID THAT THE GOVERNMENT USED PURJURED TESTIMONY MERELY BECAUSE ONE OF ITS WITNESSES WAS PARTIALLY IMPEACHED BY PRIOR INCONSISTENT STATEMENTS.

Appellant contends that he is entitled to a reversal of his conviction simply because a portion of Jacqueline Smith's testimony before the grand jury and in an F.B.I. interview report was to some extent inconsistent with his testimony at trial. Appellant cites no authority, and we can find none, for this novel propositions; and we respectfully submit that this Court should view this argument, as do we, as totally without merit.

Each of the stated rules support the admissibility into evidence of the cashing of money orders not charged in the indictment, as well as, the fact of Mr. Harris stealing of the mail.

A second consideration is the fact that any of this type of evidence is addressed to the sound discretion of the trial judge. U.S. v. Krulewitch, 145 F.2d 76 (2d Cir. 1944); U.S. v. Byrd, 352 F.2d 570 (2d Cir. 1965). This discretion is based upon the balancing of the probative value of the evidence against its prejudicial character. In this case, the trial judges decision to admit the evidence of other crimes could not be considered a clear abuse of discretion. In U.S. v. Byrd, id., the following test was established:

> In measuring the probative value of the evidence, the judge should consider: (1) the extent to which the evidence of prior criminal activities, closely related in time and subject matter, tends to establish that the accused acted with the requisite criminal intent, (2) whether the proferred evidence is largely cumulative from a quality-of-proof standpoint, and (3) whether the Government faces no real necessity to offer such evidence, either because it has ample proof of intent apart from such evidence or because the defendant has raised no issue as to intent.

Applying these standards to the situation in this case would clearly result in the determination that the proof is admissible. The probative value definitely outweighed any prejudicial nature of the evidence. This is especially true in view of the fact that very little time was spent on this evidence, as compared to that spent on the whole case.

The government is aware of, and has little trouble accepting, the principle of law that a conviction cannot be obtained through the knowing use of false evidence. Napier v. Illinois, 360 U.S. 264 (1959); Mesorosh v. U.S., 352 U.S. 1 (1956); U.S. v. Passero, 290 F.2d 238 (2d Cir.) cert. denied, 368 U.S. (1961). That problem is not even remotely involved here.

We take issue preliminarily with the apparant premise on which appellant basis this argument: that Smith alledgedly lied in prior statements to the F.B.I., Postal Inspectors and to the grand jury. Jacqueline Smith's testimony before the grand jury and her statements recorded on the interview reports of the F.B.I. and Postal Inspectors were turned over to appellant during trial. These were used, fully and extensively, in an attempt to impeach Smith's credibility. But such impeachment or attempted impeachment is not an unexpected or unusual occurrence in the course of a criminal trial. The mere fact that a witness may be impeached to a degree by prior inconsistent statements does not mean that the testimony is purjured as defined in Napire, id. and Mesarosh, id. Even the sturdiest of witnesses occasionally testifies inconsistently - to a greater or lesser degree - with his prior statements. As long as appellant had these prior statements at his disposal for use during cross-examination, his interests were fully protected. Link v. U.S., 352 F.2d 207 (8th Cir. 1965), cert. denied, 383 U.S. 915 (1966).

The inconsistencies claimed by the appellant were adequately explained on the record (Tr. 51; 53-54; 57-58; 63; 65-66). Of course, whether these explanations were adequate or convincing is not here relevant. As in any trial where a witness is impeached by inconsistent or incomplete previous statements, the weight, if any, to be accorded the tarnished in-court testimony is for the jury to determine. Fletcher v. U.S., 334 F.2d 584 (9th Cir.) cert. denied, 379 U.S. 948 (1964); Hattern v. U.S., 283 F.2d 339 (9th Cir. 1960). That the credibility of the government's witness is ultimately a question for the jury to determine is axiormatic. Judge (now Chief Justice) Burger stated the maxim well in Bush v. United States:

> The traditional safeguards of the Anglo-American legal system 'leave the veracity of a witness to be tested by cross-examination, and the credibility of his testimony to be determined by a properly instructed jury' (citations omitted) ... Each witness appears before a jury on his own; jurors may believe or disbelieve, accept or discount, testimony on the basis of what the witness says or does on the basis of impeachment evidence. 375 F.2d 602, 604 (1967).

At trial appellant apparently failed to convince the jury of Smith's incredibility; the jury's verdict should foreclose consideration of the issue by this Court.

## CONCLUSION

Wherefore, it is respectfully submitted that the judgment of the District Court should be affirmed.

RICHARD J. ARCARA
United States Attorney

By: GERALD J. HOULIHAN
Assistant United States Attorney

Form No. USA-20
(Rev. 10-9-58)

## CERTIFICATE OF SERVICE BY MAIL

UNITED STATES )
)
v. ) Cr. 1975-1054
)
JACKIE L. HARRIS )
)

The undersigned hereby certifies that she is an employee in the Office of the United States Attorney for the Western District of New York and is a person of such age and discretion as to be competent to serve papers.

That on May 5, 1975 she served a copy of the attached

BRIEF FOR APPELLEE

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